

Before the  
FEDERAL COMMUNICATIONS Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Ameritech for Relief from	)	CC Docket No. 98-32
Barriers to Deployment of Advanced	)	
Telecommunications Services	)	
	)	
Petition of Bell Atlantic for Relief from	)	CC Docket No. 98-11
Barriers to Deployment of Advanced	)	
Telecommunications Services	)	

**COMMENTS OF U S WEST, INC.**

U S WEST, Inc. ("U S WEST") hereby submits these brief comments on the March 5, 1998 Petition of Ameritech Corporation ("Ameritech"), consolidated for comment by Order of the Federal Communications Commission ("Commission") dated March 16, 1998 with similar petitions filed by U S WEST Communications, Inc., and Bell Atlantic Corporation ("Bell Atlantic").<sup>1</sup> Ameritech, U S WEST and Bell Atlantic all seek Commission regulatory assistance and relief to enable them to deploy new broadband technologies and services which might not otherwise be available.

<sup>1</sup> In the Matter of Petition of Bell Atlantic for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11, Petition of U S WEST for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26, Petition of Ameritech for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-32, Motion to Consolidate Filing of Comments and Replies by the Association for Local Telecommunications Services, Order, DA 98-513, rel. Mar. 16, 1998. U S WEST Petition for Relief, filed Feb. 25, 1998; Petition of Bell Atlantic, filed Jan. 25, 1998.

It is not U S WEST's practice to submit comments on its own petitions, and a full-blown support of the Ameritech Petition, given the similarity with U S WEST's own Petition, would in most respects really amount to U S WEST's filing initial comments on its own Petition seeking regulatory relief in the area of providing data services. Suffice it to say that Ameritech has made a compelling showing, and its Petition merits expeditious and favorable action, along with the U S WEST and Bell Atlantic Petitions. Several differences between the approach taken by Ameritech and that of U S WEST merit brief comment in the initial comment round.

In its Petition, U S WEST relied on a single statutory section as the sole grounds for relief from Sections 251(c) and 271 of the Communications Act of 1934, as amended ("Act"), when it provides data services.<sup>2</sup> U S WEST, upon documenting that services were being denied to consumers, particularly in rural areas, because of the application of these statutory sections to data services, sought the necessary regulatory relief only pursuant to Section 706 of the Telecommunications Act of 1996.<sup>3</sup> Section 706 directs the Commission to undertake deregulatory action with regard to any statutory section, including Sections 251(c) and 271, whenever it can be demonstrated that the section in question is interfering with "advanced telecommunications capability . . . being deployed to all Americans in a reasonable and timely fashion."<sup>4</sup>

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<sup>2</sup> U S WEST Petition at 1.

<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 § 706 (1996), codified at 47 U.S.C. § 157 note.

<sup>4</sup> Id.

Ameritech adds another statutory basis upon which the requested relief can be granted. Namely, Ameritech points out that the Commission is granted express authority to modify LATA boundaries, and that the Act quite clearly contemplates that the Commission has the power to create a single national LATA for data telecommunications.<sup>5</sup> Action under this grant of authority would permit the Commission to act in a more global manner, freeing up all Bell Operating Companies ("BOC") simultaneously to provide data services nationwide. As Ameritech pointedly observes, creation of such a national LATA which applied only to data communications would not in any way jeopardize the Section 271 process for interLATA voice services.<sup>6</sup> In fact, as noted in the U S WEST Petition, one of the key benefits to be derived from grant of these Petitions is that the circuit-switched network will be preserved and enhanced. We fully concur in Ameritech's analysis.<sup>7</sup>

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<sup>5</sup> Ameritech Petition at 12 (citing Section 3(25) of the 1996 Act). Ameritech also noted correctly that the concept of a LATA is meaningless in a packet-switched world because, unlike circuit-switched networks, packet-switched networks are connectionless. *Id.* at 12-13. Even two packets from the same message may not travel the same physical path through the network. *Id.* at 12.

<sup>6</sup> *Id.* at 13. U S WEST is of the opinion that Section 271 is a violation of the United States Constitution because it is a bill of attainder. SBC Communications, Inc., et al. v. FCC, Memorandum Opinion and Order, Civ. Action No. 7:97-CV-163-X, filed Dec. 31, 1997 (N.D. Tex.), Order Granting Stay and Denying Injunction, filed Feb. 11, 1998, on appeal, FCC, et al. v. SBC Communications, Inc. et al., No. 98-10140 (5th Cir. Feb. 18, 1998). Once the Fifth Circuit Court of Appeals has affirmed the decision and the stay issued by the District Court has been vacated, the waiver of Section 271 sought herein will not be necessary. The Section 251(c) waiver, to the extent that it is necessary at all, will remain important.

<sup>7</sup> Of course, given the fact that consumers are being denied services today because of the impact of Sections 271 and 251(c) on U S WEST's ability to provide data services, U S WEST does not suggest that action on its own Petition or any other petition be delayed at all while the Commission seeks a more global solution.

Ameritech also makes several suggestions as to how the data services which Ameritech would provide should be regulated in order to ensure that whatever market power which Ameritech (and others seeking similar relief, including U S WEST) might have in the local exchange voice market is not used to achieve anti-competitive ends in the data markets which they would enter. As an alternative to the burdensome structural separation requirements of Section 272, Ameritech suggested that the Commission should adopt the less onerous separation requirements -- adopted in the Fifth Report and Order in the Competitive Carrier proceeding -- which apply to BOC long distance affiliates providing out-of-region service.<sup>8</sup> Such an affiliate must keep separate books of account, not jointly own switching and transmission facilities with the affiliated incumbent local exchange carrier ("LEC"), and would purchase telecommunications services or facilities from the affiliated LEC at tariffed rates.<sup>9</sup> Ameritech posits that the affiliate would not be either an incumbent LEC or a dominant carrier, effectively relieving it of the more seriously disruptive rules which currently govern BOC operations.<sup>10</sup>

While the Ameritech proposal is appealing, there are several issues which require mention in dealing with the regulatory scenario described by Ameritech:

First, we agree with Ameritech that it makes eminent good sense for

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<sup>8</sup> Ameritech Petition at 18-19. And see In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order, 98 FCC2d 1191 (1984) ("Fifth Report and Order").

<sup>9</sup> Fifth Report and Order at 1198-99 ¶ 9.

<sup>10</sup> Ameritech Petition at 25-26.

U S WEST and similarly situated incumbent LECs to offer their data communications services in a manner which is completely friendly to competing information service providers ("ISP"). U S WEST noted this fact in its own Petition, and has not requested that open network architecture be abolished in its recently-filed comments in the Computer III Remand proceeding.<sup>11</sup> Moreover, neither Ameritech nor U S WEST is seeking to remove the Section 251(c) unbundling and resale requirements from those local exchange facilities that may be used to provide voice and data.<sup>12</sup> Grant of the instant waiver would in no way adversely affect competing ISPs or data providers.

As to the prospect of a Fifth Report and Order subsidiary, however, many of U S WEST's data services (e.g., its DSL services) are offered in a manner which would not be conducive to separate subsidiary operation. U S WEST's DSL services, which to a very large extent are viewed as a solution to the circuit-switch congestion problem caused by long ISP holding times, are offered over a loop in common with U S WEST's voice service. If a competitor wishes to offer DSL service, U S WEST will make conditioned unbundled loops available. In the U S WEST territory, many residences are not provisioned with a second loop -- where only a single loop is available to the premises of the customer, the competitive provider of DSL service also will need to assume responsibility for the customer's voice service. U S WEST will, of course, provide to the DSL provider the ability to obtain

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<sup>11</sup> U S WEST Comments, CC Docket Nos. 95-20 and 98-10, filed Mar. 27, 1998 in general. And see U S WEST Petition at 5, 51.

<sup>12</sup> Ameritech Petition at 18; U S WEST Petition at 48.

interconnection of the voice circuit to U S WEST's remaining network. As a practical and technical matter, however, U S WEST cannot split the loop between its own voice service and the DSL service of a competitor.<sup>13</sup> In other words, the entity providing DSL service to a customer also must provide voice service to that customer.

U S WEST would be happy to have its own subsidiary operate in the same manner as a competitive DSL provider (*i.e.*, purchase conditioned loops and collocation space and offer voice and data services). U S WEST fears, however, negative reaction from state regulators (and possibly the Commission) if U S WEST were to seek to transfer the responsibility for voice telephone service to a Fifth Report and Order affiliate.<sup>14</sup> Therefore, if a Fifth Report and Order affiliate were to be deemed an appropriate structure, the Commission should specify that it would be mandatory only for facilities and services which are actually interLATA in nature. Other data communications services and facilities should be placed in such an affiliate only when it makes sense from the perspective of the provisioning LEC. Needless to say, if utilization of a Fifth Report and Order subsidiary causes service inefficiencies, use of a Section 272 separate affiliate would be exponentially more inefficient.

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<sup>13</sup> Ameritech discussed some of the technical problems that would result from such an arrangement in its Petition. Ameritech Petition at 23.

<sup>14</sup> U S WEST has had significant difficulty certifying competitive LEC affiliates in a number of states. Understandably, some regulators are nervous about a U S WEST affiliate which is neither an incumbent LEC nor a dominant carrier providing local voice service.

Second, Ameritech observes that the Fifth Report and Order affiliate would not be an incumbent LEC under the Act, and that data services offered by the affiliate would not be subject to the unbundling and resale restrictions of Section 251(c) of the Act.<sup>15</sup> The Commission confirmed this precise premise when it ruled that Section 272 subsidiaries would not be incumbent LECs, even when they offered local exchange services, so long as network element facilities were not transferred to the subsidiaries.<sup>16</sup> Ameritech is clearly correct here, of course. At the same time, however, it is absolutely critical that an incumbent LEC not be subject to the unbundling and resale rules of Section 251(c) when it provides new services without the vehicle of an affiliate. New investment and innovation would be crushed if the potential innovator had to share its new facility at a cost-based rate or to share its new service with its competitor at a huge discount. There are a number of sections of the Act which operate to prevent this development:

- The resale and unbundling sections of the statute, by their terms, apply only to incumbent LECs. A company is an incumbent LEC only to the extent that it is providing telephone exchange services. The advanced data and telecommunications services described in the Petitions are not telephone exchange services; hence, the rules do not apply to them. The Commission can and should clarify this issue.
- It also seems self-evident that, in the case of advanced data and other new services, the failure of an incumbent LEC to make a newly-constructed

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<sup>15</sup> Ameritech Petition at 25.

facility available to a competitor at the price set for unbundled network elements could not possibly “impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer,” as that term is set forth in Section 251(d)(2) of the Act.<sup>17</sup> The Commission can simply announce that it will follow this interpretation of the Act should a competitor seek to obtain unbundled access to a new investment of an incumbent LEC which could in fact be reasonably duplicated by the competitor or another, alleviating uncertainty in this area.

- To the extent necessary, the Commission can grant the U S WEST Petition for waiver of the unbundling and resale provisions of Section 251(c) as applied to data services.<sup>18</sup>

The point is, the Commission should not restrict its proper assessment of the impact of the unbundling and resale rules as a device for stifling competition and innovation to the use of Fifth Report and Order affiliates. The Commission should deal with this potential problem quickly and decisively.

Third, Ameritech posits that a Fifth Report and Order affiliate should be classified as a non-dominant carrier under the Commission’s rules.<sup>19</sup> Again, Ameritech is correct. Once again, however, the Commission has a mandate to eliminate all unnecessary regulations, whether or not the regulation applies to an

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<sup>16</sup> Id. at 24 (citing Section 251(h)).

<sup>17</sup> 47 U.S.C. § 251(d)(2)(B).

<sup>18</sup> U S WEST Petition at 44-48.

<sup>19</sup> Ameritech Petition at 9, 21-22, 26-27.



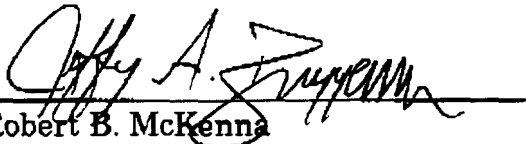
affiliate or directly to an incumbent LEC.<sup>20</sup> The Ameritech position ought not to be read as relieving the Commission of its responsibility to eliminate unnecessary regulation of data networks and data services offered by incumbent LECs directly.<sup>21</sup> As Ameritech points out, there seems to be little reason why data services ought to be regulated as dominant carrier services when offered directly by an incumbent LEC.

Fundamentally, the Ameritech Petition should be granted expeditiously. The foregoing observations should serve to caution the Commission against generalizing any of Ameritech's solutions to existing regulatory problems into rules or approaches of more general applicability.

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April 6, 1998

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<sup>20</sup> 47 U.S.C. § 157 note.

<sup>21</sup> In this regard, the study conducted by James Prieger and attached to the Ameritech Petition (at Attachment B) is especially compelling. Nothing in the Act even remotely hints that the Commission should be in the business of depriving customers of services.

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 6<sup>th</sup> day of April, 1998, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served, via first class United States mail, postage pre-paid, upon the persons listed on the attached service list.



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